In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 706

MILTON M. LEVIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, 1a–26a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1964. A petition for rehearing *en banc* was denied on September 22, 1964. The Chief Justice extended the time for filing a petition for a writ of certiorari to and including November 21, 1964, and the petition was filed on November 20, 1964. The juris-

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diction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction may properly rest upon the testimony of an accomplice.

2. Whether the court's rulings and instructions to the jury concerning evidence of petitioner's habits, offered by petitioner to corroborate his alibi, constituted reversible error.

3. Whether the evidence was sufficient to sustain a conviction for larceny by trick under Section 22–2201 of the District of Columbia Code and under the indictment as drawn.

4. Whether, after having read portions of the transcript of the grand jury testimony of a government witness to defense counsel, the court should have delivered the transcript to defense counsel.

5. Whether there was plain error in the prosecutor's summation to the jury.

STATEMENT

Petitioner was convicted of grand larceny in violation of Section 22–2201 of the District of Columbia Code,[1] on a charge that he had stolen $35,000 belonging to the Bakery and Confectionery Workers' International Union which had been entrusted to its President, James G. Cross.[2] The conviction was affirmed on appeal, one judge dissenting.

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[1] The provisions of Section 22–2201 are set out in Pet. App. E., p. 34a.

[2] Petitioner was named in count 2 of a three-count indictment and was tried separately. The charge against petitioner is printed in Pet. App. D, p. 33a.

The Government's evidence may be summarized as follows:

In January, 1959, James Landriscina and Vincent Belloni, officers of local unions of the Bakery and Confectionery Workers' International, met petitioner, a lawyer, at his office in New York City. Petitioner offered to "fix" a perjury case then pending in the District of Columbia against Cross for about $35,000 to $40,000. (R. 3–4, 6–8, 306, 309, 358, 434.) Early in February, petitioner discussed the case with Landriscina and Cross in Washington. He told them that he could fix the case for $35,000 and asked for an additional payment for himself. Cross agreed to pay him $17,500 as a lobbyist for the International (R. 9–15).

On Friday, February 13, 1959, Peter H. Olson, secretary-treasurer of the International, cashed a $35,000 check drawn on the union's funds as a strike donation (R. 210–212). The money was given to Landriscina who made two payments totalling $35,000 to petitioner.[3] Petitioner stated that he would use the money to take care of the jury, the judge, and the court attendant (R. 18–26).

While the trial of Cross was in progress, on February 16 and 17, 1959, petitioner was in the corridors of the courthouse and assured Landriscina that everything looked all right (R. 27–31, 993–995). It was stipulated that no one had approached either the judge or the jury (R. 507–508). After the trial judge directed a verdict of acquittal (170 F. Supp. 303), petitioner told Landriscina to be sure that Cross

[3] Landriscina testified, apparently incorrectly, that he made the first payment of $10,000 on February 12 (R. 19–25).

did not forget about petitioner's job as lobbyist for the International (R. 32). In March 1959, petitioner submitted an undated bill to the union for "services rendered through February 28, 1959" (Government Exhibit 8, R. 60). During 1959, the union paid petitioner $20,000 for his services (R. 226–228). Various officials of the International testified that they were not aware of any services that petitioner had performed for the union (R. 207, 228, 379–381, 386–395, 404–405).

ARGUMENT

1. Petitioner attacks the credibility of James Landriscina and asks this Court to re-examine the rule that permits a defendant to be convicted on the uncorroborated testimony of an accomplice, *Holmgren* v. *United States*, 217 U.S. 509; *Caminetti* v. *United States*, 242 U.S. 470, 495. There is no occasion for that rule to be re-examined in this case. Although Landriscina was the only witness who testified directly that he gave petitioner $35,000 to procure the acquittal of Cross, his testimony was corroborated circumstantially. Belloni, for example, testified that at Landriscina's request he asked petitioner if he could bring down the price of $35,000 for the case and asked what would happen to the money. He testified that petitioner refused to lower the price and said, "What's the difference where the money would go as long as the job is done" (R. 310). Belloni also testified that a few days after the trial of Cross was concluded, petitioner boasted, "When I say something will be done, it is usually done" (R. 312).

Although petitioner argued in the court of appeals that Landriscina's testimony was contradicted by other evidence and that the case was a close one, the point now urged was not raised below. There are no exceptional circumstances warranting its consideration by this Court. See *Lawn* v. *United States*, 355 U.S. 339.

2. Landriscina testified that the transfer of $25,000 occurred at about 5:00 p.m. on Friday, February 13, in a park in the District of Columbia (R. 25–26). Petitioner admitted that he had been in the District of Columbia on that day, but testified that he left for New York no later than one o'clock. He stated that he never went away from his home on Friday evening, the Jewish Sabbath (R. 699–701). Petitioner's wife testified that he always remained at home on Friday night and never worked on the Sabbath (R. 923–924). Four other witnesses gave evidence indicating either that petitioner did not work on the Sabbath or that he was always at home on Friday evenings (R. 512–515, 531–533, 561–567, 625–638).

(*a*) After Rabbi Irwin Isaacson had testified as a character witness for the defense (R. 864–865), petitioner's counsel approached the bench and stated that he wished "to go into the subject matter with this witness concerning Mr. Levin's habit of being home on the Sabbath and using him as an expert to testify when the Sabbath commenced and what Orthodox ritual requires" (R. 866). This testimony was excluded.

As the majority opinion below pointed out (Pet. App. 6a–17a), the value of evidence of a person's

habits as proof of his conduct on a particular occasion depends on the particular circumstances of each case, and the admissibility of such evidence turns not only on the question of relevance but also on the inconvenience and danger of confusion from the introduction of collateral issues into the trial. Other witnesses as well as the petitioner himself testified to his practice of remaining home on Friday night, and Rabbi Isaacson's testimony in this respect would have been merely cumulative. There was no indication in his testimony that he was the rabbi of the synagogue which petitioner attended. With respect to the offer of testimony concerning "what Orthodox ritual requires," such testimony would have been far afield of the question whether petitioner had been at home on a particular Friday night, particularly in view of all the testimony that petitioner did in fact regularly remain at home on the Sabbath. In these circumstances, rejection of the proffered testimony was well within the discretion of the trial court.

(*b*) In the instructions to the jury, the court stated:

> It is my recollection that Mr. Levin testified, as did other witnesses, that he has a habit or practice of a religious nature whereby he stays at home from sundown Fridays to sundown Saturdays. You are told that proof of such a habit or practice is not proof that the defendant is never elsewhere at that particular time. [R. 1065.]

Reasonably interpreted, this instruction did not, as petitioner contends (Pet. 12), eliminate from the

jury's consideration evidence of his religious habits as proof that he was not in Washington on the Friday evening in question. The instruction told the jury no more than what common sense dictates—that evidence of a regular practice does not establish that there has been no deviation from the practice. Coupled with the instructions on the defense of alibi (R. 1065–1066), the challenged instructions placed the evidence of petitioner's habits in its proper relation to the other evidence in the case.

3. Petitioner argues that he could not be convicted of grand larceny on a charge of stealing the union's funds because he did not know that the money which he obtained from Cross belonged to the union and did not make any representations to the union. The court of appeals correctly construed the statute, which makes it a crime "feloniously [to] take and carry away anything of value * * *," as involving an offense against the possession rather than the ownership of property, and held that the elements of the crime of larceny by trick of false representation and reliance need not be shown with respect to the union but only with respect to Cross (Pet. App. A, pp. 4a–6a). This is a question of the construction of a local statute, which is primarily for the court of appeals and does not warrant review by this Court. Cf. *Griffin* v. *United States*, 336 U.S. 704, 715–718.

Nor is there merit in the claim that the evidence does not support a conviction of larceny by trick under the indictment as drawn. Petitioner concedes that the money involved belonged to the union, as

charged in the indictment. It is clear, moreover, that Cross, the president of the union, was responsible for the withdrawal from its funds of the money which was paid to petitioner and that, irrespective of the purpose for which Cross intended to use the money, he was "entrusted" with it within the meaning of the indictment.

4. At the conclusion of the cross-examination of Landriscina, defense counsel indicated that he was interested in certain aspects of Landriscina's testimony before the grand jury and moved for production of the transcript. He asked the court to examine the testimony *in camera* or to permit the defense to examine it (R. 187–188). The court followed the former course and found no inconsistencies with Landriscina's testimony at the trial. Concluding, however, that defense counsel might find inconsistencies, she read aloud the portions of the transcript which pertained to the issues in which counsel had expressed an interest. Counsel was permitted to take notes (R. 736). When the reading was finished, counsel thanked the court and gave no indication that he was not satisfied. There is no reason to believe that the procedures employed were not adequate. In any event, having failed to move for further disclosure in the trial court, petitioner has no valid ground for objection here.

5. There is no substance to petitioner's present contention regarding the summation by the prosecution. In addition, the point was not raised in either court below.

With respect to the prosecutor's remarks concerning the character witnesses for the defense, to which petitioner now objects (Pet. 38), their context reveals that they were not improper:

> Now, ladies and gentlemen, he asked you, does this look like a man who could do this? It is not the question, whether he looks like it. Unfortunately, since he raises that question, I will have to give you an example. There was a man named Robin Hood and he was bent, in his concept of mind, on good and what did he do? He robbed, and everybody in his band; if he had to go to court, I'll bet he could get as a character witness the same people who were his accomplices. I don't mean that to cast aspersions on the character testimony of the witnesses, insofar as their knowledge is concerned. Apparently, from the testimony, they didn't know anything about this situation and this incident, and they didn't come to Washington. [Closing Arguments 62]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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